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Supreme Court of the United States

LUCY WARD STEBBINS and FRANK J. HURLEY, Executrix and Executor of the Will of HENRIETTA PIERCE WATKINSON, deceased,

Plaintiffs in Error,

vs.

RAY L. RILEY, Controller of the State of California,

Defendant in Error.

No. 697
October Term,
1934.

JOINT BRIEF *AMICI CURIAE* FOR CERTAIN DECEDENTS' ESTATES IN NEW YORK.

MARTIN SAXE,
27 Pine Street,
New York, N. Y.

SAMUEL P. GOLDMAN,
120 Broadway,
New York, N. Y.

Attorneys for Certain Decedents' Estates in New York.

CHARLES E. McSPARREN,
WILLIAM F. UNGER,
of Counsel.

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SUPREME COURT OF THE UNITED STATES.

LUCY WARD STEBBINS and FRANK J. HURLEY, as Executrix and Executor of the Will of HENRIETTA PIERCE WATKINSON, deceased, *Plaintiffs in Error,* *vs.* RAY L. RILEY, Controller of the State of California, *Defendant in Error.*	No. 227 October Term, 1924.

JOINT BRIEF *AMICI CURIAE* FOR CERTAIN DECEDENTS' ESTATES IN NEW YORK.

Statement.

By permission of the Court upon the consent of counsel for the respective parties, this joint brief is filed *amici curiae* on behalf of certain decedents' estates in New York.

The common Federal question.

The assignment of errors herein (T. R., pp. 31-33) presents the following Federal question affecting the taxation of inheritances in a large number of States, including New York, having "legacy", as distinguished from "estate", taxes at progressive rates:

> Has a State the power in imposing progressive rate legacy taxes to require arbitrarily that the applicable rate, and measure of such tax, be

> determined by attributing to the value of the legacy the amount of the Federal estate tax?

No state statute so providing has been passed on by this Court. The only case now before the Court presenting a similar question but not involving the more marked discrimination on account of graded rates, is *Frick* v. *Commonwealth of Pennsylvania*, Nos. 442-445, October Term, 1923, argued but not decided.

The California provision involved.

California's prior Inheritance Tax Act was construed in *Estate of Kennedy*, 157 Cal. 157; 108 Pac. 280 and *Estate of Miller*, 184 Cal. 674; 195 Pac. 413, as allowing deduction of the Federal estate tax. Such holding gave rise to the provision quoted below, the invalidity of which is claimed herein: (Stat. 1917, ch. 589, §2, subd. 10)

> "In determining the *market* value of the property transferred, no deduction shall be made for any inheritance tax or estate tax paid to the Government of the United States." (italics throughout this brief are ours, except titles)

California's new Inheritance Tax Act of 1921 allows deduction of the Federal estate tax.

Although the instant case arose under the statute of 1917 as quoted above, for the Court's information the provision of California's new Inheritance Tax Act (Ch. 821, Laws 1921 as amended by Ch. 337, Laws 1923) now in force is as follows:

> "§10. In determining the market value of the property transferred, the following deductions and no others shall be made from the appraised value thereof: (a, b, c and d are immaterial subdivisions)

"(e) The amount due or paid the government of the United States as a federal inheritance or estate tax; provided, however, that the amount of such tax allowable herein as a deduction shall be limited to a computation thereof (commencing at the primary rates) made by the acting state inheritance tax appraiser upon his own valuations of that portion of such property only, the transfer of which is taxable under the provisions of this act, by applying to such valuations the exemptions and rates of the federal inheritance or estate tax in force at the date of such transfer."

Recent decisions of this Court defining the nature of the Federal estate tax.

In *Edwards* v. *Slocum*, 264 U. S. 61, 62, the nature of the Federal estate tax was clearly defined:

"But this is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton* v. *Moore*, 178 U. S. 41, 49, 77. It comes into existence *before* and is *independent of* the *receipt of property by the legatee.* It taxes, as *Hanson, Death Duties,* puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death.' "

Again in *Young Men's Christian Association* v. *Davis*, 264 U. S. 47, 50, the priority thereof was emphasized:

"Congress was thus looking at the subject from the standpoint of the testator and not from the immediate point of view of the beneficiaries. * * * Congress was in reality dealing with the testator *before* his death. * * * In §408 it is declared to be the intent and purpose of Congress that as far as it is practicable and unless otherwise directed

by the testator, the tax is to be paid out of the estate *before distribution.*"

Aside from the sovereign paramount power of the Federal government, an estate tax has a logical priority over a legacy tax. The latter is upon what remains after payment of the former.

The New York Statute.

The "transfers" which are taxable under Article 10 of the New York Tax Law are defined by Section 243 thereof, as amended in 1910:

> "The word 'transfer' as used in this Article shall be taken to include the *passing* of property or any interest therein in the *possession or enjoyment, present or future*, by inheritance, descent, devise, bequest, grant, deed, bargain, sale or gift, in the manner herein prescribed."

The similarity of the New York Transfer Tax Law to California's Inheritance Tax Act is apparent from the following excerpt from the same section:

> "The words 'estate' and 'property', as used in this article, shall be taken to mean the property or interest therein *passing or transferred to individuals or corporate legatees,* devisees, heirs, next of kin, grantees, donees or vendees, and *not* as the property or interest therein of the decedent, grantor, donor or vendor and shall include all property or interest therein, whether situated within or without the state."

Prior to 1910, the tax policy of New York was quite the reverse. The words "estate" and "property" were then defined to mean "the property or interest therein of the testator, intestate, grantor," etc. passing or transferred and "*not* as the property or interest therein passing or transferred *to* individual legatees, devisees," etc.

The provisions now in force above quoted have been construed, so far as decedents' estates are concerned, as meaning that the New York Transfer Tax Law imposes a *legacy* tax measured by the beneficial interest *passing*.

Matter of Zborowski, 213 N. Y. 109, 113.
New York Trust Co. v. *Eisner*, 256 U. S. 345.

In further construction, it has been held that no deduction of the Federal estate tax is permissible under the terms of the New York statute.

Matter of Sherman, 222 N. Y. 540.
Matter of Carnegie, 236 N. Y. 517.

No federal question was raised in the above cases. Ever since the *Sherman* case, this has been the practice in New York.

Matter of Woolworth, 206 App. Div. 768; appeal denied 207 App. Div. 828; 239 N. Y. (not yet reported).
Matter of Taylor, 209 App. Div. 299.
Matter of Nesbitt, 204 App. Div. 504; aff'd 237 N. Y. 527.
Matter of Bierstadt, 179 App. Div. 497.
Matter of Wittman, 112 Misc. 168.
Matter of Canda, 114 Misc. 161; reversed on other grounds 197 App. Div. 597.
Matter of Nichols, 120 Misc. 228.
Matter of Benson, 120 Misc. 136.

In this connection, the regulations of the State Tax Commission provide:

> "Article 158—Estate, transfer and inheritance taxes.—Federal estate taxes, • • • imposed upon decedent's estate, are not deductible under any circumstances, either from the residuary estate or from a specific bequest, and this is true regardless of any provision the will of a decedent may contain."

Sections 221 and 221-a of the New York Tax Law classify beneficiaries and fix the tax rates as summarized below:

Beneficiary	Exemption	Amounts to $25,000 over Exemption	$25,000 to 100,000	$100,000 to 200,000	Over $200,000
CLASS A					
Father, mother, husband, wife, child, adopted child, lineal descendant	$500 to lineal descendants, if in excess thereof no exemption. All others $5,000.....	1%	2%	3%	4%
CLASS B					
Brother, sister, wife or widow of son, husband of daughter, mutually acknowledged child...	$500; if in excess thereof no exemption.....	2%	3%	4%	5%
CLASS C					
All others not exempt...	$500; if in excess thereof no exemption.....	5%	6%	7%	8%

A majority of the States allow deduction of the Federal estate tax.

An analysis of the situation in the various states shows that legacy taxes are imposed in all but four—Alabama, Florida, Mississippi and Utah. The first two do not tax legacies or estates in any form. The latter two have estate, in place of legacy, taxes. It might also be mentioned that Oregon and Rhode Island have the dual form of both legacy and estate taxes.

The States (28) listed below now allow deduction of the Federal estate tax in measuring their taxes upon legacies:

By Statute: California, Iowa, Kentucky, Montana, New Jersey and North Carolina.

Under court decision in the absence of specific statutory provision: Connecticut, Illinois, Indiana, Massachusetts, Minnesota, Ohio and Oregon.

In practice, without specific statutory or court authority: Arkansas, Delaware, Georgia, Idaho, Maine, Maryland, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, Tennessee, Texas, Vermont and Virginia.

The states (16) which do not allow deduction of the Federal estate tax include:

By Statute: Colorado, Pennsylvania, Rhode Island and South Dakota.

Under court decision in the absence of specific statutory provision: Kansas, Louisiana, Michigan, New Hampshire, New York, Washington and Wisconsin.

In practice, without specific statutory or court authority:

Arizona, Nevada, South Carolina, West Virginia and Wyoming.

In New York and other states, where Federal estate taxes may not now be deducted, legatees are without recourse except on the grounds hereafter discussed, and in the brief for the plaintiffs in error, showing that states exceed their powers in arbitrarily denying such deductions.

ARGUMENT

California's Supreme Court erred in sustaining the validity of the provision that "In determining the market value of the property transferred, no deduction shall be made for any inheritance tax or estate tax paid to the Government of the United States."

The constitutionality of the present Federal estate tax law was upheld in *New York Trust Company* v. *Eisner,* 256 U. S. 345. The priority of the taxes imposed thereby was established in *Young Men's Christian Association* v. *Davis,* 264 U. S. 47 and in *Edwards* v. *Slocum,* 264 U. S. 61.

By this valid exercise of sovereign power, the Federal Government has excluded *ab initio* such part of decedents' estates, thus appropriated, from disposition by decedents and likewise has limited the State's taxing jurisdiction to the balance.

The effect of the California statute is precisely what this Court condemned in *Knowlton* v. *Moore,* 178 U. S. 41, most recently cited with approval in *Edwards* v. *Slocum* (*supra*).

In *Knowlton* v. *Moore,* the constitutionality of the War Revenue Act of 1898 (20 Stat. 448) was upheld. Such Act, unlike the present Federal estate tax law, but similar to the California statute, imposed graded taxes upon *legacies.* However, the then Federal administra-

tive officials insisted upon the practice of basing the applicable tax rates upon the value of the whole estate instead of the amount thereof actually passing to the legatee. In holding such taxing methods invalid, this Court said: (p. 76)

> "In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount."

The discrimination and inequality resulting from the arbitrary requirement of the California statute that the rate of the legacy taxes in such State be fixed by the amount of the Federal estate tax plus the value of the beneficial interest actually received, is only *different in degree* from that given in the above example.

If taxation of legacies by a rate dependent upon a wholly distinct and separate thing independent of the value thereof, is violative of constitutional limitations, manifestly California has exceeded its power in this regard.

As a more concrete illustration of the palpable arbitrariness of measuring a legacy tax upon a basis in excess of the value of the beneficial interest, this Court continued in *Knowlton* v. *Moore*: (p. 76)

> "The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeaths to a hospital ten thousand dollars. The rate of tax would be five per cent, and the amount of tax five hundred dollars. Another person dies at the

> same time, leaves an estate of one million dollars, and bequeaths ten thousand dollars to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax $1250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given."

Sufficient illustration of the arbitrariness of not allowing deduction of the Federal estate tax is given by the actual cases of

> *Matter of Carnegie*, 236 N. Y. 517.
> *Matter of Benson*, 120 Misc. (N. Y.) 136.

Mrs. Carnegie actually received as residuary legatee $2,268,088.44. Under the arbitrary terms of the Transfer Tax Law as applied by court decisions denying the right to deduct the Federal estate tax, her legacy was assessed upon the assumption that she had received $5,343,125.94. The difference, $3,075,037.50 represented the Federal estate tax paid out of the residuary estate before distribution.

The *Benson* case was even more extreme. Therein the New York transfer tax upon the residuary estate was sustained, under the arbitrary requirements of the statute as applied by the New York courts, although the *entire* residuary estate had been exhausted by payment of the Federal estate tax. Here the residuary legatee had the choice of renouncing the legacy or paying the tax out of pocket.

In this instance, the residuary estate consisted only of the amount needed to meet the Federal estate tax on the entire estate. Yet the transfer tax in New York was *wholly* measured by the said residuary legacy, wiped out though it was to meet the estate tax paid to the Federal Government and regardless of the fact that the legatee never received one penny of such legacy.

Could a more arbitrary provision be conceived? Seldom would two different residuary legatees, occupying the same relation and taking in the same character and receiving legacies of the same amount, pay the same tax under such a statute.

Obviously legacy taxes thus imposed constitute a denial of the equal protection of the laws and the taking of property without due process of law.

Such drastic statutory provisions are not sanctioned by the fundamental principles of law, irrespective of constitutional limitations, as indicated in *Knowlton* v. *Moore*, (*supra*): (p. 77)

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

This Court could not have stated more graphically the fundamental reason why the California Inheritance Tax Act is invalid. In effect, the California statute arbitrarily provides that the rate of tax shall be fixed with reference to the sum of the property of another—the Federal estate tax paid to the United States.

In construing the old Act, California's court of last resort strongly condemned the arbitrary practice of the

State officials in not allowing deduction of the Federal estate tax and held that such deduction should be made.

Estate of Kennedy, 157 Cal. 517; 108 Pac. 280.

The *Kennedy* opinion states: (108 Pac., p. 283)

> "It would appear to be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee, or legatee to certain property of the decedent, where the very property to which he is so held to succeed is lawfully diverted by the probate court to other purposes and never can be distributed to him."

The same holding was made in *Estate of Miller,* 184 Cal. 674; 195 Pac. 413, wherein the court said: (p. 679)

> "The state tax, then, being a succession tax, a tax upon what the transferee receives, and the federal tax being an estate tax, a tax upon what the decedent leaves, there would seem to be no escape from the conclusion that the federal tax must be deducted in order to determine the amount upon which the state tax should be levied, since it is plain that what the transferee receives is only the portion of what the decedent left which remains after the federal estate tax is taken."

It should be noted here that California adopted the provision of 1917 involved herein without changing the nature of the tax. In other words, after California voluntarily selected the legacy tax as the condition therein upon inheritances, more revenue was sought by a wholly inconsistent change in such policy derogatory to the constitutional rights of beneficiaries.

The courts of last resort in many states have recognized that the inclusion of the Federal estate tax as

part of the measure of a state legacy tax is too arbitrary to be countenanced.

COLORADO. *People* v. *Bemis,* 68 Col. 48; 189 Pac. 32.

> "The federal tax is 'imposed upon the transfer of the net estate * * *'. Therefore it is the power to transfer upon death that is taxed by the national law, and the estate, upon the death is, to the extent of the tax, instantly depleted (citing authorities) and, thus diminished goes to the legatees * * *.
>
> "It follows that the state tax must be measured by the estate less the $87,000 [Federal tax]."

CONNECTICUT. *Corbin* v. *Townsend,* 92 Conn. 501; 103 Atl. 647, 649.

> "The tax [Federal estate tax] is no part of the estate at the time of distribution; it has passed from the estate, and the share of the benficiaries is diminished by just so much."

ILLINOIS. *People* v. *Pasfield,* 284 Ill. 450; 120 N. E. 286, 288.

> "The federal Estate Tax Act of September 8, 1916, necessarily operated to lessen, by the amount of such tax, the *clear value* of the beneficial interest which passed to the heirs and legatees in the instant case and prevented their receiving any part of that tax, and the ruling of the county court that the same should be deducted before computing the state tax was correct."

INDIANA. *State* v. *First Calumet Trust & Savings Bank,* 71 Ind. App. 467; 125 N. E. 200, 202.

> "The tax paid to the federal government upon the net estate before distribution cannot in any sense be held to have been any part of the beneficial interest of the respective legatees or dis-

tributees, and the *market value of such beneficial interest must of necessity be the value after deducting the federal tax*, the same having been deducted from the net estate before distribution was made thereof, and it necessarily follows that the state inheritance tax should be computed upon the residue after deducting from the net estate the amount of such federal estate tax."

KENTUCKY. *Bingham's Admr.* v. *Commonwealth*, 244 S. W. 781, 787.

"We think it clear that our statute, although it makes no provision for any deductions, provides that the tax shall be estimated upon the *fair market value* of the beneficial interest of the transferee, and that the Legislature by so providing intended that that interest should be estimated at the time and in the condition that he would receive it, rather than at the time and in the condition that technically the title thereto vested in him. This construction besides being entirely consistent with the language employed, relieves the statute of the *manifest injustice of requiring the transferee to pay an inheritance tax upon the amount of the federal tax*; * * *" (The Federal tax in this case was $7,509,283.65).

MASSACHUSETTS. *Old Colony Trust Co.* v. *Burrell*, 238 Mass. 544; 131 N. E. 321, 323.

"The United States estate tax should have been wholly deducted. In its nature such a tax is a charge upon the net estate transferred by death, and not upon the succession resulting from death (citing authorities). The estate upon the death is, to the extent of the tax, instantly depleted."

MINNESOTA. *State* v. *Probate Court*, 139 Minn. 210; 166 N. W. 125.

"The federal tax operated to lessen, by the amount of such tax, the clear value of the bene-

ficial interest which passed to the two children, and the ruling of the probate court was correct."

NEW HAMPSHIRE. *Williams* v. *State*, 125 Atl. 661, 668.

"The state tax is imposed upon or measured by the amount passing to each legatee or heir. Laws 1915, c. 106, §1. If by virtue of federal legislation or for any other reason a less amount passes under the laws of this state, a less tax is imposed."

NEW JERSEY. *Bugbee* v. *Roebling*, 94 N. J. L. 438; 111 Atl. 29, 30.

"* * * the executor never has or can have a title free of the federal tax. The result is that to ascertain the *clear market value* of the taxable transfer the amount of the *federal tax must be deducted.*"

OHIO. *Tax Com.* v. *Lamprecht*, 107 Oh. St. 535; 140 N. E. 333.

"* * * the conclusion must be reached that every kind of debt, charge, expense, and claim of valid nature against a decedent's estate should be deducted, and the succession tax be computed only upon the net balance."

OREGON. *Inman's Estate*, 101 Or. 182; 199 Pac. 615, 620.

"The federal estate tax, or the tax upon the right to transmit, is, in the final analysis, measured by the net value of the *old interest which ceased with death*; while the inheritance taxes, or the tax upon the right to receive, are measured respectively by the values of the several *new interests which were created by death.* * * * The federal estate tax paid to the national government by the executors reduced the value of the property which passed to the legatees and devisees to the extent of such payment; and hence, when the

> widow and daughters were required to pay an inheritance tax on any part of the amount of the federal estate tax, they were required to pay a tax on property which never passed to them."

The opinion herein below (T. R., pp. 41-45) summarily dismisses the claim of invalidity, without reference to *Knowlton* v. *Moore*, (*supra*), by the flat assertion that the Federal Constitution is inapplicable to inheritance taxes because of the State's plenary power with reference to the succession of property and because such taxes are not upon property.

Evidently the Court overlooked *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, involving the constitutionality of the Illinois State Inheritance Act, wherein it is stated in the opinion:. (p. 292)

> "The power of the States over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that [Federal] constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws."

Mr. Justice Brewer, in writing a dissenting opinion holding that the Illinois Inheritance Tax Act was repugnant to the Fourteenth Amendment, agreed with the majority of the Court that a state's power in imposing legacy taxes was limited by this constitutional restraint. Where he differed was that he considered the classifications in the Illinois statute were arbitrary and therefore exceeded the State's constitutional power. He forcefully explained why a State has no plenary power by which it can arbitrarily ignore the Fourteenth Amendment with regard to inheritances: (p. 302)

> "The argument is that because the State may regulate inheritances and the extent of testamentary disposition it may impose thereon any burdens,

> including therein taxes, and impose them in any manner it chooses. * * * True, the State may regulate, but it has no arbitrary power in the matter. The property of a decedent does not at death become the property of the State, nor subject to its disposal according to any mere whim or fancy."

This true rule was also given expression in *Maxwell* v. *Bugbee,* 250 U. S. 525, 537:

> "* * * the assessment of such taxes [inheritance] is, of course, subject to applicable limitations of the state and federal constitutions."

The classifications of the Illinois statute imposing progressive rate legacy taxes sustained in the *Magoun* case, were based upon the relationship of the beneficiary to the decedent and upon the value of the beneficiary's interest.

What this Court said with reference to the latter feature indicates the limit to which a State may go: (p. 300)

> "The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the *value* of that inheritance. The condition is not arbitrary because it is determined by *that value* * * *".

Contra, when legacy taxes are graded by something else than, and in excess of, the value of the legacy (as by the inclusion of the Federal estate tax) the condition of inheritance is purely arbitrary. This is obviously so when a statute like California's specifically provides that "*market value*" includes the Federal estate tax.

As the New York statute (Subd. 8, Section 220, Tax Law) imposes the tax "upon the clear market value", the disallowance of the deduction of the Federal estate tax by court construction, results in a similar arbitrary condition upon inheritance.

Where there is a residuary estate, the burden of the inequality of such arbitrary provision is borne alone by the residuary legatee because the Federal estate tax is a charge against the estate as a whole. This makes the invalidity of the statute more pronounced.

Matter of Hamlin, 226 N. Y. 407.
See also T. R., p. 26.

It is no answer to say that all residuary legatees are treated alike. They are not. The taxes on their legacies depend upon the extrinsic circumstance of the Federal estate tax which varies with the size of each estate. The rate therefore, in the same invalid manner as was condemned in *Knowlton* v. *Moore*, (*supra*) depends on the value of something not received. The *Carnegie* and *Benson* cases (*supra*) showed that.

In fact, no two residuary legatees, of different estates, occupying the same relation and taking in the same character, and having beneficial interests of equal net value, would pay the same amount of taxes *unless the entire taxable estate in each instance were also equal in value*—a condition too rare to sustain the constitutionality of a classification.

Citizens of the United States are protected from arbitrary state legislation by the Constitution. Certainly no state has power to impose upon them legacy taxes for the privilege of inheritance and then measure such taxes on a value in excess of the value of the beneficial interest.

The practical effect resulting from the inclusion of the Federal estate tax is

(a) to tax an amount not received,
(b) which amount bears no necessary relation in value to the value of the beneficial interest actually received;

(c) and further, because of the progressive rates, to impose in some cases a higher tax rate upon amounts not received (Federal estate tax) than in other cases, where, notwithstanding, in both instances the beneficial interests actually received are of the same value and the recipient beneficiaries of the different estates occupy the same relation and take in the same character.

As held in *Maxwell* v. *Bugbee, supra,* whatever power states may have with respect to legacies, it does not include the enactment of measures: (250 U. S. at p. 542)

> "so wholly arbitrary and unreasonable to be beyond the legitimate authority of the State."

It is respectfully submitted that the California provision under consideration clearly violates the "due process of law" and "equality" clauses of the Fourteenth Amendment and the rule in *Knowlton* v. *Moore* (*supra*).

MARTIN SAXE,
SAMUEL P. GOLDMAN.

CHARLES R. MCSPARREN,
WILLIAM F. UNGER,
of Counsel.

In the Supreme Court
OF THE
United States

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LUCY WARD STEBBINS and FRANK J. HURLEY, as executrix and executor of the will of Henrietta Pierce Watkinson, deceased,
Plaintiffs in Error,
vs.
RAY L. RILEY, Controller of the State of California,
Defendant in Error.

No. 227

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR PLAINTIFFS IN ERROR

CAREY VAN FLEET,
Crocker Building, San Francisco,
JOSEPH G. DE FOREST,
Forcroft Building, San Francisco,
SIDNEY M. EHRMAN,
Nevada Bank Building, San Francisco,
MAURICE E. HARRISON,
WILLIAM M. MADDEN,
Crocker Building, San Francisco,
Attorneys for Plaintiffs in Error.

LLOYD M. ROBBINS,
LUTHER ELKINS,
Crocker Building, San Francisco,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1924

LUCY WARD STEBBINS and FRANK J. HURLEY, as executrix and executor of the will of Henrietta Pierce Watkinson, deceased,
Plaintiffs in Error,
vs.
RAY L. RILEY, Controller of the State of California,
Defendant in Error.
No. 227

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT OF THE FEDERAL QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

The legislature of the State of California in 1917 passed an Inheritance Tax Act which was one of a series of such acts, the Act of 1917, however, repealing previous acts. In this Act of 1917 it was pro-

vided, in Subdivision 10 of Section 2 thereof that, in determining the market value of the property transferred, no deductions shall be made for any inheritance tax or estate tax paid to the Government of the United States. Previous acts did not contain this deduction and the Supreme Court of the State of California in the *Estate of Miller,* 184 Cal. 674, in interpreting these acts, held that the California inheritance tax was a tax on the beneficial interest of each beneficiary or heir. The Supreme Court of the state held that if there be more than one beneficiary or heir, there is a separate tax on the interest of each, computed on its net clear value and chargeable against it (*Estate of Miller,* 184 Cal. 678). The Supreme Court of California then held that the state tax, being a tax upon what the transferee receives, and the federal tax being an estate tax upon what the decedent leaves, there was no escape from the conclusion that the federal tax must be deducted in order to determine the amount upon which the state tax should be levied, since it was plain that what the transferee receives is only the portion of what the decedent left which remains after the federal tax is taken (*Estate of Miller,* 184 Cal. at pp. 679-680). The Supreme Court of California declared that it would appear to be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee or legatee to certain property of the decedent when he never succeeded to such property. This was the construction which the Supreme Court of

California placed upon the Inheritance Tax Acts of 1905, 1911, 1913 and 1915.

In 1917, as already pointed out, the legislature of the State of California, ignoring the demands of justice and equality, as pointed out by the Supreme Court of California, interpolated into the inheritance tax act of that year the provision we have already referred to and which is being attacked here, that in determining the market value of the property transferred, no deduction should thereafter be made for any inheritance tax or estate tax paid the United States Government. This provision remained in the Inheritance Tax Act of California until 1921, when it was repealed. The Inheritance Tax Act of 1921 provided, in Subdivision 10 of Section 2, as follows:

"10. In determining the market value of the property transferred, the following deductions and no others shall be made from the appraised value thereof:

(a) Debts of decedent owing at date of death;

(b) Expenses of funeral and last illness;

(c) All state, county, and municipal taxes which are a lien against said property at the date of death;

(d) The ordinary expenses of administration, including the ordinary fees allowed executors and administrators and the ordinary fees of their attorneys under the provisions of sections one thousand six hundred eighteen and one thousand six hundred nineteen of the Code of Civil Procedure of California;

(e) The amount due or paid the government of the United States as a federal inheritance or estate tax; provided, however, that the amount of such tax allowable herein as a deduction shall be limited to a computation thereof (commencing at the primary rates) made by the acting state inheritance tax appraiser upon his own valuations of that portion of such property only, the transfer of which is taxable under the provisions of this act, by applying to such valuations the exemptions and rates of the federal inheritance or estate tax in force at the date of such transfer;

(f) The amount due or paid any state or states of the United States (excepting California) as a state inheritance, succession or transfer tax provided, however, that the amount of such tax allowable herein as a deduction shall be limited to a computation thereof (commencing at the primary rates) made by the acting state inheritance tax appraiser upon his own valuations of that portion of such property only, the transfer of which is taxable under the provisions of this act, by applying to such valuations the exemptions and rates of such state inheritance, succession or transfer tax in force at the date of such transfer." (Statutes of 1921 Chap. 821, page 1500.)

The provision of the Act of 1917 was repealed upon the recommendation of the Controller of the state for the reason that it was unjust and inequitable. The history of this provision and the recommendation of the Controller are found in the biennial report of the State Controller for 1918-1920, pp. 21-22, as follows:

"FEDERAL ESTATE TAX SHOULD BE ALLOWED AS A DEDUCTION IN CALIFORNIA.

In 1917 the legislature ordained that:

'In determining the market value of the property transferred, no deduction shall be made for any inheritance or estate tax paid to the Government of the United States'.

It will be remembered that at the time the provision was enacted the United States had not yet entered the World War, and the imperative need for federal revenue that later resulted as the immediate effect of that war was not then in existence. It was at that time the opinion of all the states, as well as of the legislature of California, that in enacting a law levying a federal estate or inheritance tax Congress had invaded a source of revenue and was exercising a taxing prerogative that in justice to the respective states should be preserved solely to them. It was felt that in comparison with the sources of revenue available to the federal government, the states were at great and obvious disadvantage and that, therefore, federal inheritance taxation should be resisted and rebuked in every legitimate way.

Accordingly, the legislature of California said that in determining the clear market or net value of property passing by inheritance no deduction should be allowed for the payment of the federal estate tax.

Today conditions are vastly different. It is now apparent that the federal estate tax will be with us for at least many years. The need of the United States for governmental revenue must necessarily continue to be very great for an indefinite period. I, therefore, recommend that in all fairness and equity, the legislature should repeal our present provision, and ordain the federal estate tax to be a proper legal deduction

> in arriving at the clear market value of an inheritance. My reasons are that unless we allow it as a deduction, we really tax a man for something he does not get. He receives an inheritance diminished to the extent of the taxes he is compelled to pay by law, yet is compelled to pay an inheritance tax on the false assumption that he receives the full amount undiminished. This is neither fair nor equitable. The one consideration above all others which has made this law the most popular of all tax laws is its appeal to fairness and equity. Its wholesome purpose has been to rightfully place upon the wealthy a larger share of the burden of taxation which only too often weighs unevenly and hard upon those least able to bear it. But this purpose should only be achieved 'rightfully', and it is not right or just to tax a party for property he does not receive, but on the contrary is diverted from him by operation of law. I respectfully recommend that the present provision denying the exemption of the federal estate tax as a deduction be repealed, and that it be expressly recognized as a proper legal deduction to be allowed in determining the clear market value of inheritance."

It was agreed by all persons concerned therefore, including the officers of the State of California, and the attorneys of the Controller in the present action, that the provision of the Inheritance Tax Act of 1917 was unjust and inequitable. The case comes to this court on a writ of error directed to the Supreme Court of California which, in spite of its previous ruling that such a provision would be unjust and inequitable, in the present case held, on

appeal from the order refusing to modify the report of the Inheritance Tax Appraiser for the State of California so as to allow the deduction of the federal estate tax in arriving at the net value of the estate, that said provision of the Act of 1917, Subdivision 10 of Section 2, was not unconstitutional.

The federal question was first raised in the objections to the report of the Inheritance Tax Appraiser in the Probate Court of the State of California, as will be seen by reference to the transcript of record, folios 44-50. The federal question was pressed strongly upon the Supreme Court of the State of California, but was dismissed in a short paragraph (see folio 88, Transcript of Record).

The question before this court, therefore, resolves itself into this: Does the provision of the California Inheritance Tax Act of 1917, Subdivision 10 of Section 2, which is admittedly an unjust and inequitable provision, and inconsistent with the spirit and meaning of the Inheritanee Tax Act of California, violate the fundamental principles of our Government?

This provision of the Inheritance Tax Act of 1917 admittedly compels the heir, devisee or legatee to pay a tax on the property which he never receives, and admittedly the State of California attempts to tax the separate legacies not by their own value, but by that of a wholly distinct and separate thing. Admittedly by this arbitrary provision, the rate of tax is fixed with reference to the sum of the prop-

erty of another person. Admittedly, the tax imposed under the law of 1917 is upon a privilege or right running to one person, but measured by a distinctly different privilege or right running to another person.

It will be our purpose to show that the unjust burden and profound inequalities arising from the imposition of this tax subject the individual to the arbitrary exercise of the powers of Government unrestrained by the established principles of private right and distributive justice, thus violating the "due process" and "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States.

We respectfully urge upon this court to keep continually in mind in this discussion that the inheritance tax act of California is a legacy tax, a tax upon what the transferee receives, and not a transfer tax, as are the federal estate tax and the inheritance taxes of many states. Argument upon the nature of the California tax is precluded by the *Estate of Miller,* 184 Cal. 674, and kindred cases.

The question is also raised that these provisions of the California Inheritance Tax Act of 1917 are repugnant to clause 1 of Section 8 of Article I of the Constitution of the United States in that they interfere with the power of Congress to levy and collect taxes, duties, imports and excises, to pay the debts and provide for the common defense and general welfare of the United States.

ASSIGNMENTS OF ERROR.

(Transcript of record, folios 66-70, pp. 31-32.)

FIRST: The court erred in adjudging and deciding that the provisions of the "Inheritance Tax Act" of the State of California, as amended in 1917, statutes of California 1917, page 880, chapter 589, in respect to Subdivision 10 of Section 2 thereof, are not in conflict with and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States for that the State of California by and through the provisions of said statute assumes and seeks to deprive and does deprive plaintiff in error and certain citizens and persons within the jurisdiction of the State of California of (fol. 67) property without due process of law. That said Subdivision 10 of Section 2 of said statute provides as follows:

> "In determining the market value of the property transferred, no deduction shall be made for any inheritance tax or estate tax paid to the Government of the United States."

SECOND: That the court erred in adjudging and deciding that the provisions of the "Inheritance Tax Act" of the State of California, as amended in 1917, statutes of California 1917, page 880, chapter 589, in respect to Subdivision 10 of Section 2 thereof, are not in conflict with and in violation of the provisions of the Fourteenth Amendment of the constitution of the United States for that the State of California by and through the provisions of said

statute assumes and seeks to deny and does deny to plaintiff in error herein and certain citizens and persons within the jurisdiction of the State of California the equal protection of the law.

THIRD: The court erred in holding that by the provisions of said statute plaintiff in error is not deprived of property without due process of law.

FOURTH: The court erred in holding that by the provisions of said statutes plaintiff in error is not denied the equal protection of the law.

FIFTH: That the court erred in adjudging and deciding that the provisions of the "Inheritance Tax Act" of the State of California as amended in 1917, Statute of California, 1917, page 880, chapter 589, in respect to Subdivision 10 of Section 2 thereof, are not in conflict with and in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States, and erred in ignoring the rule laid down in the case of *Knowlton v. Moore,* 178 U. S. page 41, which rule applies particularly to the case at bar and which (fol. 68) is to the effect that an arbitrary provision fixing the rate of a succession tax with reference to the sum of the property of another brings about such a profound inequality that it would transcend the limitations arising from the fundamental conceptions of a free Government which underlie all constitutional systems.

SIXTH: That the court erred in adjudging and deciding that said "Inheritance Tax Act" and par-

ticularly Subdivision 10 of Section 2 thereof does not contravene the Fourteenth Amendment of the Constitution of the United States in view of the fact that the "Inheritance Tax Act" of the State of California has been decided to be a succession tax, that is to say, a tax upon what the transferee receives (*Estate of Henry Miller,* 184 Cal. 674), and the Federal tax being an estate tax, that is to say, a tax upon what the decedent leaves, there is no escape from the conclusion that the Federal estate tax must be deducted in order to determine the amount upon which the succession tax should be levied.

SEVENTH: That the court erred in adjudging and deciding that said "Inheritance Tax Act" of the State of California is valid for the reason that by the terms of said act it provides for a tax upon property belonging to the United States Government and provides for a lien thereon. Section 3 of said "Inheritance Tax Act" providing as follows:

> "Sec. 3. Such taxes shall be and remain a lien upon the property passed or transferred until paid; provided, that said lien shall be limited to the property chargeable therewith, and the person to whom the property passes or is transferred and all administrators, executors and trustees of every estate so transferred or passed, shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed."

EIGHTH: That the court erred in adjudging and deciding that said provisions of the "Inheritance

Tax Act" are not repugnant to clause 1 of Section 8 of Article I of the Constitution of the United States in that they interfere with the power of Congress to levy and collect (fol. 69) taxes, duties, imports and excises, to pay the debts and provide for the common defense and general welfare of the United States.

NINTH: That the court erred in ordering judgment for the defendant in error herein.

STATEMENT OF FACTS.

The above named decedent, Henrietta Pierce Watkinson, died testate August 7, 1920, leaving an estate passing under the Inheritance Tax Laws of California which became effective July 27, 1917. In computing the inheritance taxes due the state, the Inheritance Tax Appraiser in his report made no deduction on account of moneys paid the United States Government as a federal estate tax.

Under the provisions of the Revenue Act of 1918, the executors were required to and did pay to the United States Government from and out of the estate as and for a federal tax thereon, the sum of $128,730.08. The state inheritance tax appraiser in thereafter making his appraisement and report upon such estate, refused and failed to deduct any part of this payment in arriving at the net market value of the legacies subject to the state inheritance tax. The report thereon as to the state tax due was con-

sequently $26,205.75 greater in amount than such tax would have aggregated had such deduction been made, and the legacies bore the burden of this increase. The court, over the objection of the executors, confirmed said report as to this particular portion thereof (Transcript of Record, folios 1-10), and from its order so made and entered, an appeal was taken to the Supreme Court of the State of California (Transcript of Record, folios 10, 60-61). The Supreme Court of California wrote two opinions,—one upon the first submission of the case (folio 81), filed May 24, 1923, and an opinion upon rehearing, filed August 15, 1923 (folio 85). The latter opinion is the reported opinion and is found reported in Volume 191 of the California Reports, at page 591.

From this decision of the Supreme Court of the State of California a writ of error was taken to this court.

The Material Parts of the California Statute Are the Title and Parts of Section 2 and Section 3 of the Statutes of California, Chap. 589, Statutes of 1917, p. 883.

"Inheritance Tax Act of 1917.

An act to establish a tax on gifts, legacies, inheritances, bequests, devises, successions and transfers, to provide for its collection and to direct the disposition of its proceeds; to provide for the enforcement of liens created by this act and by any act hereby repealed and for suits to quiet title against claims of liens arising hereunder, or under an act hereby repealed, to be known as the 'Inheritance Tax Act'; and

to repeal Chapter five hundred ninety-five of the laws of the session of the legislature of California of 1913, approved June 16, 1913, known as the 'Inheritance Tax Act', and all amendments thereto and to repeal all acts and parts of acts in conflict with this act. (Approved May 23, 1917. In effect July 27, 1917.)

* * * * * * *

Sec. 2. A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, to be paid to the treasurer of the proper county, as hereinafter directed, for the use of the state, said taxes to be upon the market value of such property at the rate hereinafter prescribed and only upon the excess over the exemptions hereinafter granted, in the following cases:

* * * * * * *

10. In determining the market value of the property transferred, no deduction shall be made for any inheritance tax or estate tax paid to the government of the United States.

Sec. 3. Such taxes shall be and remain a lien upon the property passed or transferred until paid; provided, that said lien shall be limited to the property chargeable therewith, and the person to whom the property passes or is transferred, and all administrators, executors and trustees of every estate so transferred or passed shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. The provisions of the Code of Civil Procedure relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine, or enforce the collec-

tion of any tax or penalty prescribed by this article, and this section shall be construed as having been in effect as of date of the original enactment of the inheritance tax law; provided, that unless sued for within five years after they are due and legally demandable, such taxes, or any taxes accruing under any act herein repealed, shall cease to be a lien as against any bona fide purchaser of said property; and, provided, that no such lien shall cease within two years from the date of the passage of this act."

The Supreme Court of California has held that the California tax is a succession tax, a tax on the beneficial interest of each beneficiary or heir. If there be more than one beneficiary or heir there is a separate tax on the interest of each, computed on its net clear value and chargeable against it. The court will forgive this reiteration, but we invite a careful perusal of the case of the *Estate of Miller*, 184 Cal. 674.

The Supreme Court of California has also held that the plain purpose of the act was that the clear market value of the beneficial interest transferred should be its net clear value. This has been the construction given it in actual administration by the courts.

Estate of Miller, 184 Cal. 674;
Estate of Kennedy, 157 Cal. 517;
Estate of Hite, 159 Cal. 392.

Point I.

THE SUPREME COURT OF CALIFORNIA IN ITS OPINION IGNORES THE CONSTITUTION OF THE STATE OF CALIFORNIA AND OF THE UNITED STATES IN DEFINING THE POWER OF THE STATE IN LEVYING AN INHERITANCE TAX.

The Supreme Court of California summarily disposes of the arguments addressed to the Fourteenth Amendment to the Constitution of the United States and to the Constitution of the State of California, with a general statement that the state has full and unlimited power to attach conditions and burdens to the privilege of succeeding to property. The Supreme Court of California declares that the State of California has power to confiscate such portion of the estate of a decedent as it sees fit and its opinion makes no allowance for its own Constitution or the Fourteenth Amendment to the Constitution of the United States despite the fact that its own court, as well as this court, has repeatedly declared that taxes, excise, or otherwise, must be levied so as not to produce unequal burdens, arbitrary discriminations or capricious confiscation. The opinion of the court of California is therefore fundamentally unsound under our principles of government and it erroneously assumes that the fundamental principle is the right of the state to compel a contribution from the estate of any decedent, which right of the state it assumes to be unlimited. This is the omniscient, infallible and all-sufficient principle with which the

Supreme Court of California answers every argument advanced in this case.

The opinion of the Supreme Court of California ignores those provisions of the state constitution which recognize the right to inherit in California and protect that right so that the right to inherit may no longer be said to be a creature of the legislature in this state.

Section 25 of Article IV of the Constitution of the State of California provides:

> "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:
>
> Twelfth: Affecting estates of deceased persons, minors or other persons under legal disabilities.
>
> Thirtieth: Changing the law of descent or succession."

Section 8 of Article XX of the State Constitution provides:

> "All property, real and personal, owned by either husband or wife before marriage, and that acquired by either of them afterward by gift, devise or descent, shall be their separate property."

These provisions of the California constitution recognize the laws of descent. At least they place some restraint upon the power of the state.

The opinion of the Supreme Court of California ignores the limitations which the Supreme Court of the United States has always placed upon the

exercise by a state of its power to regulate the right to inherit. Those limitations may be summed up in the expressions of *Magoun v. Illinois Trust & Savings Bank,* 170 U. S. 283; *Campbell v. California,* 200 U. S. 87; *Orr v. Gilman,* 183 U. S. 278.

Defining these limitations this court said in *Orr v. Gilman,* supra, at page 287:

> "In the light of the principles thus established we are unable to see in this legislation of the State of New York, as construed by its highest court, any infringement of the salutary provisions of the Fourteenth Amendment. There are involved no arbitrary or unequal regulations, prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them. The moneys raised by the taxation are applied to the lawful uses of the state, in which the legatees have the same interests with the other citizens. Nor is it claimed that the amount or rate of the taxation is excessive to the extent of confiscation."

This court also said, in *United States v. Perkins,* 163 U. S. 628:

> "Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good."

It is not at all settled, then, that there is no such thing as a natural right to inherit, and this court has never held that all property of a decedent may be confiscated to the state, and there are well defined limitations upon the burdens which the state may impose upon inherited estates. In the ordinary dealings between man and man, the courts are not over-careful in guarding their language as to the rights of heirs, devisees and legatees. They are very liable to call them vested rights. It is only where the taxing power of the state is involved that they resurrect the old theory of grace and privilege and, creatures of the state.

So in this case of the *Estate of Watkinson*, 191 Cal. 597, the Supreme Court of California said:

> "The fundamental answer to the most of these constitutional objections is to be found in the proposition above set forth, that an inheritance tax is not a property tax, but is essentially a tax upon the statutory privilege of testamentary transfer or succession, and that the state in extending the privilege may place such limitations upon it as it deems proper in the way of burdens upon its exercise."

This is the sole answer of the Supreme Court of California to the constitutional argument made in this case even in face of its previous holdings that such an exaction as that complained of here would be unjust and inequitable. Under the reasoning of the Supreme Court in the *Estate of Watkinson*, the heirs, legatees and devisees would not be entitled to any deductions from the gross value of the estate

even though the previous decisions of the Supreme Court required these deductions where no provision was made in the statute for them.

However that may be, the legislature of California since its earliest history has extended this right or privilege to all its citizens, and thereafter in administering these rights or privileges it may not place unjust burdens upon them consistently with the Constitution of the United States.

The following sections of the Civil Code provide:

Sec. 1341:

> "When devises and bequests vest. Testamentary dispositions, including devises and bequests to a person on obtaining majority, are presumed to vest at the testator's death."

Sec. 1342:

> "When cannot be divested. A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose."

Sec. 1384:

> "Intestate's estate, to whom passes. The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration."

It has been held by the Supreme Court of California in the long line of authorities that the rights

of the heirs, legatees or devisees become vested immediately upon the death of the testator or intestate.

Point II.

IN CALIFORNIA THE RIGHTS OF HEIRS, LEGATEES OR DEVISEES BECOME VESTED RIGHTS AND MAY NOT BE SUBJECTED TO UNJUST BURDENS OR ARBITRARY RULES IN THE LEVYING OF TAXES CONSISTENTLY WITH THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In the *Estate of Stanford*, 126 Cal. 112, the Supreme Court of California held that the right of the state to an inheritance tax was a vested right which became vested immediately upon the death of the decedent. In the *Estate of Stanford*, at page 119, the Supreme Court says:

> "The state here, from the death of the decedent, had a present fixed right of future enjoyment to the five per cent of his estate. This is property or a thing of value belonging to the state.
>
> The following from the Civil Code is merely reciting the common law: 'The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code the thing of which there may be ownership is called 'property'. (Civ. Code, Sec. 654.) 'There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill, as the composition of an author, goodwill of a business, trademarks and signs; and of rights created or granted by statute.'

> (Civ. Code, sec. 655.) It is, therefore, not the possession alone, but the right to possess which constitutes the ownership; *and ownership may be 'of rights created or granted by statute', as the case here.* It would be altogether a new definition in the law to hold that one who had not obtained possession of a thing or had parted with its possession could not be the owner of such thing. This would be contrary to the teachings of elementary law, which recognizes a right in action as well as a right in possession. The rule contended for would make ownership depend altogether upon strength and agility in obtaining and holding possession of things."

To be consistent, in order to support this right of the state, the Supreme Court summoned to its support its former holdings that the right of the beneficiary or heir vested immediately upon the death of the decedent.

So in the case of *Trippett v. State*, 149 Cal. 529, the Supreme Court of California said:

> "The beneficiary under the will, or the heir, is in no way deprived of the benefit of these provisions because the statute enacts or the court holds that the state's right to the tax vests on the decedent's death. The right, although vested, is still, as to actual collection, subject to the appraisement provided for. There is no legal inconsistency in the idea of a right being vested, although the possession may be postponed or contingent upon the performance of certain acts. *An apt example is to be found in the right of the heir himself. It is the settled law of this state that upon the death of an owner of property, intestate, his estate at once descends to and vests in his heirs, subject to the*

possession of the administrator for all purposes of administration. (Civ. Code, sec. 1384; Bates v. Howard, 105 Cal. 173, (38 Pac. 715); Brenham v. Story, 39 Cal. 179.) But the heir must await the completion of administration and the determination of his heirship by the decree of distribution before he can enter upon the enjoyment and possession of his vested right. So here, the fact that the right of the state to the tax is vested on the death of the decedent does not carry with it the right to take possession of the interest so vested without performance of the conditions (of appraisement, notice, etc.) to which its right of possession may be subject. The mere fact that the right of the state to its proportion of the gift or inheritance is declared to vest prior to any appraisement does not deprive the beneficiary or heir of any substantial right where the law affords him the opportunity to be heard as to the amount of the tax before there is any actual collection or payment thereof."

Also see the following cases:

Estate of Woodard, 153 Cal. 39;
Estate of Martin, 153 Cal. 225;
Estate of Kennedy, 157 Cal. 517;
Estate of Potter, 188 Cal. 55-60.

It follows, therefore, that we are dealing with vested rights in dealing with the rights of inheritance or rights of beneficiaries under a will. As a matter of right reasoning, therefore, it would seem that these vested rights may not be subjected to unjust burdens or arbitrary rules either at the moment of vesting or at any time thereafter. To make a distinction giving the state the right to

levy an unjust tax because it was levied at the moment of vesting, a right which admittedly it could not exercise thereafter, leads us into the realm of metaphysics, and this court has never favored metaphysics in dealing with constitutional rights.

As is said by Mr. Justice Holmes in the case of *Chanler v. Kelsey*, 205 U. S. 480:

> "If then a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the state court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State; and, as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. *Matter of Pell*, 171 N. Y. 48, 55; *Matter of Seaman*, 147 N. Y. 69."

Under the decisions of the Supreme Court of California, the estate of the heir or beneficiary had

become vested at the time that the tax was levied. There was no element or step necessary to complete the vesting at that time.

In the case of *Magoun v. Illinois Trust & Savings Bank,* 170 U. S. 283, at p. 289, this court pointed out, quoting from *United States v. Fox,* 94 U. S. 315, that the power of the state to regulate the tenure of real property within her limits included the transfer and acquisition of such property during life as well as after death and the disposition of such property whether by deed, descent or any other mode. It needs no argument to demonstrate that the state may not place unjust burdens upon or make arbitrary rules for the transfer or acquisition of property by deed. To apply a different rule, therefore, to the vesting of property by the testamentary or intestate laws of the state leads us again into the realm of metaphysics, which may not be tolerated under the Fourteenth Amendment. The basis of the power of the state is the same in both cases.

As is said by Mr. Justice Brewer in his dissenting opinion in the *Magoun* case, p. 302 (and this language is not inconsistent with the majority opinion):

> "True, the state may regulate, but it has no arbitrary power in the matter. The property of a decedent does not at his death become the property of the State, nor subject to its disposal according to any mere whim or fancy. And yet if it is a purely arbitrary power I

do not see what constitutional objection could be raised to any disposition which a legislature might make of the property of any decedent. Take the illustration made by counsel for appellant: Could the legislature of Illinois, which passed this statute, constitutionally enact that the estate of every person dying within the limits of the State should be given to the members of that legislature? Or, if the matter of personal benefit be interposed as against the validity of such legislation, could it enact that the property of A, on his death, should pass to the State; the property of B to some religious or charitable institution; and the property of C be divided among his children? Can there be a doubt that such inequality of legislation would vitiate it? *But whatever may be the power of the legislature, Illinois had regulated the matter of descents and distributions and had granted the right of testamentary disposition.* And now by this statute upon property passing in accordance with its statutes a tax is imposed; a tax unequal because not proportioned to the amount of the estate; unequal because based upon a classification purely arbitrary, to wit, that of wealth—a tax directly and intentionally made unequal. I think the Constitution of the United States forbids such inequality."

Point III.

THE TAX ON THE INTEREST OF THE BENEFICIARY OR HEIR CAN ONLY BE COMPUTED ON THE NET CLEAR VALUE OF SUCH INTEREST AS HE ACTUALLY TAKES ON DISTRIBUTION AS BENEFICIARY OR HEIR CONSISTENTLY WITH THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is not a matter of importance under the Fourteenth Amendment whether we define the interest of the heir or beneficiary as the result of a right or a privilege. He may not be taxed for property which he never receives nor for a privilege which he never exercises; and the rate of the tax upon what he does receive may not be fixed according to an arbitrary standard, that standard being the property, right or privilege of some other person. Even in dealing with matters over which the state has purely arbitrary power such as the granting to a foreign corporation of the right to do business, this court has held that the state in extending that privilege is bound by the Fourteenth Amendment from arbitrary or capricious acts.

This court said in the recent case of *Airway Electric Appliance Corporation v. Day*, U. S. Supreme Court Advance Opinions, 1924-1925, November 1, 1924, at pp. 13-14:

> "The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement."

* * * * * * * *

> "It is clear that the mere number of authorized nonpar-value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made. Southern R. Co. v. Green, 216 U. S. 400, 417, 54 L. ed. 536, 541, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; F. S. Royster Guano Co. v. Virginia, 253 U. S. 412, 415, 64 L. ed. 989, 990, 40 Sup. Ct. Rep. 560. The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. Martin v. District of Columbia, 205 U. S. 135, 139, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440; Gast Realty & Invest. Co. v. Schneider Granite Co., 240 U. S. 55, 58, 60 L. ed. 523, 525, 36 Sup. Ct. Rep. 254; Kansas City Southern R. Co. v. Road Imp. Dist., 256 U. S. 658, 660, 65 L. Ed. 1151, 1156, 41 Sup. Ct. Rep. 604. The act violates the equal protection clause of the 14th Amendment."

Likewise, Mr. Chief Justice Taft in the case of *Truax v. Corrigan*, 257 U. S. 312, discusses again the limits of the Fourteenth Amendment and its equal protection clause in language which reminds one of the early fathers, and in the course of his discussion he says, at page 334:

> "It is beside the point to say that plaintiffs had no vested right in equity relief and that taking it away does not deprive them of due process of law. If, as is asserted, the granting of equitable remedies falls within the police power and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause which forbids the granting

of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction. The Fourteenth Amendment as this court said in Barbier v. Connolly, already cited, intended 'not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property; the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences'."

There are many subjects over which the legislature exercises the power of regulation, and "vested rights" is a more or less indefinite phrase, new meanings being added as the principles of justice and equality may demand.

Under the inheritance tax law of the State of California, as interpreted by the decisions of the Supreme Court, the beneficiary or heir becomes entitled to the net clear value of his legacy, devise or bequest, and this right vests, upon the death of the

decedent, although the possession and enjoyment is postponed.

The Supreme Court of California has decided that the California inheritance tax is a tax upon the legacies, devises or bequests, in other words, upon what the beneficiary or heir actually receives. To fix a computation of this tax according to a purely arbitrary standard (and by arbitrary standard is meant —without some relation to the value of the property received), violates the Fourteenth Amendment, and in the language of *Campbell v. California*, supra, is "beyond the pale of governmental authority".

We come now to the case of *Knowlton v. Moore*, 178 U. S. 41, which sums up and is decisive of this question. This great case which is the basis of the later decisions of this court and the guide and refuge of both the taxing powers and the taxpayers of the United States, is too well understood by this court for extended reference. But it deals with just such a situation as confronts us in the case at bar and it gives concrete examples such as we will give later in this brief of the result of measuring a tax on legacies or devises by purely arbitrary standards.

On pages 76-77 Mr. Justice White says:

> "Granting, however, that there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be

compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeathes to a hospital ten thousand dollars. The rate of tax would be five per cent, and the amount of tax five hundred dollars. Another person dies at the same time, leaves an estate of one million dollars, and bequeathes ten thousand dollars to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax $1250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given.

We are, therefore, bound to give heed to the rule, that where a particular construction of a

statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. Bate Refrigerating Co. v. Sulzeberger, 157 U. S. 1, 37; Wilson v. Rousseau, 4 How. 646, 680; Bloomer v. McQuewan, 14 How. 539, 553; Blake v. National banks, 23 Wall. 307, 320; United States v. Kirby, 7 Wall. 482, 486. Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation.

It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems. On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists, since, as we understand the law, we are clearly of opinion that it does not sustain the construction which was placed on it by the court below."

It cannot be that the Supreme Court of California kept in mind in deciding the case at bar, as it

undoubtedly did in the *Estate of Miller,* supra, the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of that death, the two being different objects of taxation.

The Supreme Court of California was too enamoured of the doctrine that the rights of beneficiaries and heirs were the creatures of legislation as interpreted by itself.

The Supreme Court of California overlooked the fact that when privileges or rights are extended or granted they must be by laws operating equally upon all its citizens and that laws which capriciously and arbitrarily lay unjust burdens upon its citizens whether you call their relations to the state privileges or rights, natural or otherwise, violate the Fourteenth Amendment and the fundamental principles of our Government. That unjust burdens lead to profound inequalities is as true as the law of gravitation.

The arbitrary standard of measurement of the California Act of 1917 in including the federal estate tax in the market value of the interest to be taxed is of the same nature as the arbitrary measurement of the tax condemned in *Knowlton v. Moore,* supra.

Under the California Act of 1917 the federal tax paid the United States Government is a part of the gross estate, just as the debts and charges of administration are a part of the gross estate in so far

as the beneficiary or heir is concerned. For the California tax is a legacy tax and not a transfer tax. If the reasoning of the Supreme Court of California is true, the reasoning of Mr. Justice White in *Knowlton v. Moore*, supra, is fallacious. Because, under the doctrine of the California court, a legacy tax could and should be measured according to the value of the gross estate.

Counsel for the State of California rely upon *New York Trust Company v. Eisner*, 256 U. S. 345, which points out that in all taxing statutes there are inequalities which cannot be avoided. The point, however, is that when a tax law directly necessarily and intentionally creates an inequality of burden, it comes in conflict with the Constitution of the United States (*Magoun v. Illinois Trust & Savings Bank*, supra).

In 1910 in the *Estate of Kennedy*, 157 Cal. 517, the Supreme Court of California pointed out that it would be unjust and inequitable to tax the heir and beneficiary for an interest which they never received. In the face of this declaration, the legislature purposely inserted in the Act of 1917 the provision that the federal tax should not be deducted in estimating the market value of the interest transferred.

The tax in question here does not fall within the rule sanctioned in *Magoun v. Illinois Trust & Savings Bank*, supra, wherein it is said at p. 300:

> "The rule does not require, as we have seen, exact equality of taxation. It only requires

> that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, *and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value;* it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' "

But falls within the rule stated in *Dana v. Jackson*, 256 U. S. 599, wherein it is said:

> "A state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—'to spoliation under the guise of exerting the power of taxing.' "

There can be no more glaring example of flagrant and palpable inequality between the burden imposed and the benefit received than that of taxing the heir or beneficiary for a privilege which was never extended, a right which is never enjoyed or property which is never received.

POINT IV.

ASSUMING THAT THE INHERITANCE TAX OF CALIFORNIA IS A PRIVILEGE TAX, THE ACT OF 1917 UNCONSTITUTIONALLY IMPOSES A RULE THAT THE TAX FOR A PRIVILEGE RUNNING TO ONE PERSON SHALL BE MEASURED BY A DISTINCTLY DIFFERENT PRIVILEGE RUNNING TO ANOTHER PERSON.

It becomes evident that the legislature cannot, if we accept the doctrine of *Knowlton v. Moore,* tax one man for a privilege granted to another, and yet the operation of the portion of the act in question does result in this unconscionable situation.

The decedent in her life time is the possessor of a privilege *to transmit* property by deed or will or the laws of succession, though the exercise of that right is taxable only at death; the donee, legatee or heir is the possessor of a privilege *to receive,* taxable only upon the death of the donor, testator or relative.

We do not question the reasonable amount or percentage that might be levied by the state upon either privilege, but we do question its power to tax the beneficiary's *right to receive* based in whole or in part upon the decedent's *right to transmit.*

By the act in question as construed by the court the state, in effect, says to the legatee in this and similar cases:

> "The price you must pay for *your* privilege *to receive* is a certain percentage of what you actually receive and in addition *you* are taxed a further sum for the *privilege granted to the testatrix to transmit.* We define your privilege

> and fix a percentage tax on what you receive measured by the market value, and then collect an additional tax from you upon a privilege granted to the testatrix although *she,* through the executors, has already paid to the government a tax for *her* privilege. *Your* tax is measured in part by the value of the privilege given to the testatrix and for which privilege she has paid a tax to the Federal Government."

This is directly opposed to the view expressed by Chief Justice White in *Knowlton v. Moore,* supra. There the attempted rate of the federal legacy tax was based, not upon the value of the legacy received, but upon the value of all legacies in the entire estate, and therefore was based upon the combined rights of other legatees, and only a strained construction saved the act from being declared invalid.

In the case of a residuary legatee who is also a general or specific legatee, the enforcement of our act would frequently deny to him all right to the bounty of the testator by reason of the illegal measurement of his tax.

Take as an instance the computation of the tax payable by the first legatee named in the order modifying and confirming the report of the inheritance tax appraiser in the case at bar, as shown in folio 5 of the Transcript of Record, to wit:

Name, relationship to deceased, character and value of interest	Exemption and rates	Tax
Constance Heeley, stranger:	$500.00	
	24,500.00 at 5%	$ 1,225.00
	25,000.00 " 10%	2,500.00
Money ..... $ 25,000.00	50,000.00 " 15%	7,500.00
1/7 Residue 162,335.78	87,335.78 " 20%	17,467.16
$187,335.78		$28,692.16

If the residue was entirely depleted by payment of the federal estate tax, as has happened within the knowledge of attorneys for plaintiffs in error the operation of the act in question in conformity with the opinion of the Supreme Court of California would also entirely wipe out the money legacy of $25,000.00, for the inheritance tax exacted is in excess of that amount.

Take the following illustration:

Net Taxable Estate		$2,000,000.00
Federal Tax (act of 1917, effective Oct. 4, 1917)		$ 202,000.00
50,000 at 2%	1,000	
100,000 at 4%	4,000	
100,000 at 6%	6,000	
200,000 at 8%	16,000	
300,000 at 10%	30,000	
250,000 at 10%	25,000	
500,000 at 12%	60,000	
500,000 at 12%	60,000	

Let us say that X, a stranger, is given by will, a legacy of $25,000 and is also residuary legatee, and that the residuum amounts to $202,000

The value of estate upon which X is taxed under the State Act of 1917 is:

Legacy	$ 25,000
Residuum	202,000
	$227,000

The State Tax on $227,000 to a stranger is $37,975.00:

24,500	at 5%	1,225.00
25,000	at 10%	2,500.00
50,000	at 15%	7,500.00
100,000	at 20%	20,000.00
27,000	at 25%	6,750.00
		$37,975.00

From the above it is clear that the legatee X, is deprived of his legacy of $25,000 by reason of the fact that the Act of 1917 declares that he must pay a tax, not only on $25,000, but also on an additional $202,000 which he never received.

If the Watkinson estate were of greater value (and additional legacies bequeathed) the residue would all be used in payment of the federal estate tax, and yet the residuary legatee would be compelled to pay a tax that would entirely deplete the money legacy of $25,000.00; in other words, the legatee of a specified sum who is also named as a residuary legatee, would be compelled to pay a tax governed by the value of the entire estate, a situation that is so forcefully condemned in *Knowlton v. Moore*, supra, where the court calls attention to the gross inequality of taxation upon a basis that at-

tributes "to A's house the value of B's house, which may be worth a hundredfold the amount."

The loss of her share of the *residue* in such an event is not the fault of the Act of 1917 in question, and we make no complaint concerning it, for that loss is occasioned by a valid tax levied by the Federal Government, *but the loss of the money legacy of $25,000.00 is occasioned because her state inheritance tax was measured, not alone by what she received, but mainly by the testatrix's right to transmit, though the exercise of the latter right was fully paid for out of the general estate.*

Under the illustration above set forth, where the residue is depleted by the payment of the federal estate tax, the testator, if the Act of 1917 is valid, in attempting to give more to a legatee already given a specific sum of money in the will, by adding thereto a residuary bequest, succeeds only in depriving the legatee of all the testator attempted to give, including the specific sum of money.

Thus a testator dying while the act was in force gives a legacy to A, a stranger, in the sum of $25,000.00, and the legatee pays a state inheritance tax of $1,225.00, leaving the net amount to be received by him $23,775.00. The testator also makes a bequest to B, a stranger, in the sum of $25,000.00 and then names him as residuary legatee, and in such case B suffers the loss of part or all of his legacy of $25,000.00 by reason of the inequitable provision of the Act of 1917 exacting a tax upon a residue that he never received.

As repeatedly stated, the inheritance tax in California is a succession tax and not an estate or transfer tax, and an estate tax lessens the value of the whole estate and may result in a pro rata reduction of all legacies in the event that the residue is not sufficient to pay the federal estate tax in full, but in the illustration last given there can be no proportionate reduction, because the state inheritance tax is assessed against B and he must pay it even though it entirely depletes his bequest of a specific sum of money.

The same inequality arises in case of intestacy.

Let us assume two cases, the estates of Smith and of Jones.

First: let us assume that Smith leaves a net estate, after payments of debts and expenses of administration, of $100,000, and that the estate goes in equal shares to his two heirs, A and B. Deducting the federal estate tax of 2% on $50,000 thereof (the first $50,000 of the estate being exempt), or $1000 for the tax, leaves $99,000 for distribution, or $49,500 to each of the two heirs.

Next: let us assume that Jones leaves a net estate of exactly $49,500, which all goes to his sole heir, C.

Now we readily concede that the state is not responsible for the fact that A and B, by reason of the imposition of the federal estate tax, together receive no more from the $100,000 estate left by Smith than C receives from the $49,500 estate left by Jones. That is a matter over which the state has

no control, and which cannot be helped. But the state, by its legislation of 1917 attempts to say that A and B shall pay a *state inheritance tax* larger than C, upon the assumption that A and B have each received $50,000, and C but $49,500. The state imposes *its own tax* in such a manner that A and B actually have less distributed to each of them, after deducting the taxes, than has C. Why this discrimination against A and B? It is not the result of paying the federal tax—after payment of that tax there are legacies of equal value available for distribution to A, B and C. It is because *the state* attempts to levy a greater tax against A and B than it does against C, concededly based upon something they do not receive. Because Smith's estate has already contributed to the federal government, the state, for that very reason and no other, takes an additional sum from his heirs, which it does not take from Jones' heir.

In other words, the legislature attempts to tax the several inheritances, not according to their value to the heirs, but by a wholly distinct and different measure, bearing no relation to the benefits conferred upon the persons thus taxed. There is no reasonable ground for this discrimination against A and B and in favor of C. The provision of the Act of 1917 which requires A and B to pay greater state inheritance taxes than C, and leaves *less* to be distributed to each of them from the $100,000 estate of Smith than it leaves to be distributed to C from

the $49,500 estate of Jones, is arbitrary, unfair, and runs counter to the constitutional provision.

Indeed, if we assume that the state, as the opinion holds, may make any such arbitrary rule as the basis for calculating inheritance taxes, then it could just as well declare that the taxes should be levied on the basis of the *gross* estate of the decedent, and that no deduction should be made for debts or expenses of administration. Then we would have such examples of lack of uniformity as this: Smith leaves an estate of $100,000, but of a net value of only $10,000. The inheritance tax, let us assume, is 10% of $100,000, or $10,000, so that the entire net estate is consumed and Smith's heirs get nothing. But Jones leaves an estate of only $50,000 of which $10,000 is net. The inheritance tax of 10% on $50,000 being deducted leaves $5000 for distribution to the heirs. Although both estates are of the same net value the heirs of the $100,000 estate get nothing, but the heirs of the $50,000 estate get $5000! Clearly this is neither uniform law nor due process. And if it is not, then it is equally certain that it is not uniform law to tax one person a greater amount than another, for the privilege of enjoying an inheritance, merely because the one has already contributed to the Federal Government and the other has not.

POINT V.

SUBDIVISION 10 OF SECTION 2 AND SECTION 3 OF THE ACT OF 1917 ARE AN INTERFERENCE WITH THE POWER OF CONGRESS TO LEVY AND COLLECT TAXES, DUTIES, ETC., UNDER CLAUSE 1 OF SECTION 8 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

It appears from the history given by the State Controller quoted in the first part of our brief under "Statement of the Questions Involved" that it was the evident intention of the legislature by inserting these provisions in 1917 to rebuke and resist inheritance taxation by the Federal Government. It was intended to deny the paramount right in the Federal Government to first collect its estate tax. This would seem to be so by virtue of the provisions of Section 3 of the Act of 1917, combined with Subdivision 10 of Section 2. Under Section 3, the tax to be paid pursuant to the statute shall remain a lien upon the property passing or transferred until paid. In other words, by the terms of this act, the tax is made a lien upon a fund which belongs in effect to the United States Government and on which the United States Government has a first lien.

It might well occur by reason of the arbitrary measure of taxing required by Subdivision 10 of Section 2, that a combined state and federal tax would be imposed exceeding the value of the property.

We understand this very condition has occurred in the probate court in some of our counties in California. The question of priority then arises. On

this question of priority we think the case of *United States v. San Juan County*, 280 Fed. 120, is sound, and the case of *McCullough v. Maryland*, 4 Wheat. 17 U. S. 316, 431, is applicable. This question was fully discussed in the case of *Frick v. Commonwealth*, No. 442-No. 445, now pending in this court. But the Act of 1917 of the State of California is a more flagrant disregard of the paramount power of the United States Government for the reason that the tax provided therein is purely a legacy tax upon the net clear value of the interests received and still the act provides for a lien upon the fund which goes to the United States Government and which should be deducted before determining the net clear value, but which said act refused to deduct. This is a direct attack upon the paramount taxing power of the United States Government.

CONCLUSION.

The state tax, then, being a succession tax, a tax upon what the transferee receives, and the federal tax being an estate tax, a tax upon what the decedent leaves, there would seem to be no escape from the conclusion that the federal tax should be deducted in order to determine the amount upon which the state tax should be levied, since it is plain that what the transferee receives is only the portion of what the decedent left which remains after the federal tax is taken.

Estate of Miller, 184 Cal. 679-680.

The Inheritance Tax Act of 1917 of the State of California, in Subdivision 10, Section 2, provided that in determining the clear market or net value of property passing by inheritance or will, no deductions should be allowed for the payment of the federal estate tax.

When a tax law directly, necessarily and intentionally creates an inequality of burden, it then becomes imperative to inquire whether this inequality thus intentionally created can find any constitutional justification.

Mr. Justice Brewer in *Magoun v. Illinois Trust & Savings Bank.*

The legislature of the State of California in 1917 directly, necessarily and intentionally imposed an unjust burden upon beneficiaries and heirs in the State of California by taxing them for an interest which they never received. (See Report of State Controller, p. 5 of brief.) This burden is not one of those inequalities which arise in the exercise of the taxing power and cannot be avoided, but was intentionally created by the legislature.

Whatever may be the power of the legislature California had granted the right of testamentary disposition and the right of inheritance to its citizens and these rights become vested upon the death of the testator or intestate, and unjust burdens may not be imposed upon them at the moment of vesting, or thereafter.

Admittedly these provisions of the Inheritance Tax Act of 1917 compelled the beneficiary or heir to pay a tax on property which he never receives; and

Admittedly the State of California attempts to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing.

Admittedly the rate of tax is fixed with reference to the sum of the property of another person.

Admittedly the tax imposed under the law of 1917 is upon a privilege or right running to one person, but measured by a distinctly different privilege or right running to another person.

This arbitrary standard of measurement results in gross inequality and "transcends the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

Knowlton v. Moore, supra.

In every case of this nature which has come before this court, this court has emphasized the rule that "in assessing a tax upon such right or privilege the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing."

Plummer v. Cole, 178 U. S. 134.

Subdivision 10 of Section 2 and Section 3 of the Act of 1917 are a consciously direct and intentional interference with the power of Congress to levy and

collect its taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States.

The issues in this case are far-reaching.

An admittedly unjust and arbitrary tax.

The power of the state invoked on the one hand as an unlimited power to regulate testamentary disposition and inheritance.

On the other hand the limitations of the Fourteenth Amendment.

The issue prophesied by Chief Justice White in *Knowlton v. Moore* is here at last. The results will be far-reaching and deeply impressed.

Dated, San Francisco,
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Respectfully submitted,
CAREY VAN FLEET,
JOSEPH G. DE FOREST,
SIDNEY M. EHRMAN,
MAURICE E. HARRISON,
WILLIAM M. MADDEN,
Attorneys for Plaintiffs in Error.

LLOYD M. ROBBINS,
LUTHER ELKINS,
Of Counsel.